In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-440

GREAT SOUTHWEST WAREHOUSES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 443 F.2d 61. The Board's decision and order (Pet. App. C1-C15) are reported at 183 NLRB No. 75.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 2, 1971, and a petition for

rehearing was denied on June 29, 1971 (Pet. 2). The petition for a writ of certiorari was filed on September 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that employee Wilson did not engage in misconduct during organizational activity, and, therefore, that the company violated Section 8(a)(1) of the National Labor Relations Act by discharging him for that activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8(a) It shall be an unfair, labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7; * * *.

STATEMENT

A. The Board's Findings of Fact

John S. Wilson worked for the Company from 1960 until his discharge in October 1969, except for the period from March 12 to May 27, 1969, when he operated a business of his own (Pet. App. C8; A. 5-7).[1] In mid-March, 1969,[2] about a dozen Company employees told Wilson they were interested in starting a union. Wilson said he had belonged to a union once and that "it was a good deal if it was worked out right." (Pet. App. C8; A. 7-8.) About August 1, Wilson approached Local 745 of the Teamsters (the Union), and arranged for an organizational meeting (Pet. App. C8; A. 8-9). He subsequently secured signed authorization cards from three employees and urged others to attend union meetings (Pet. App. C8; A. 14-15). On August 19, the Union wrote the Company that it represented a majority of the Company's employees in an appropriate unit, and requested recognition (Pet. App. C8; A. 71). Thereafter, pursuant to a stipulation executed by the Company and the Union, a Board representation election was scheduled for October 13 (Pet. App. C3-C4).

On October 10, Company Dispatcher Fisk called Wilson to the Company office and handed him the following letter:

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[1] "A." refers to the appendix to the briefs in the court below.

[2] It is not clear whether this occurred during Wilson's employment with the Company or whether it occurred while he was operating his own business. See Pet. App. C8, n. 7.

> You are hereby discharged and your service terminated from this company because you have threatened and intimidated other employees with loss of their job if they did not join the Teamsters Union and attempted to force these employees to sign cards and join the union in order to work for this company.
>
> Anyone working for this company may engage in lawful union activity, but this company will not tolerate threats and intimidation directed to employees. [Pet. App. C9; A. 73-74.]

Wilson read the letter, stated that he understood it, and left the office (Pet. App. C9; A. 14). The Union thereafter filed an unfair labor practice charge with the Board (Pet. App. C6).

At the unfair labor practice hearing, three Company witnesses testified that Wilson had made threatening statements to them during his organizational efforts on behalf of the Union, and that they had reported his conduct to Dispatcher Fisk (Pet. App. C9-C10; A. 20-47, 48-57, 57-63).[3] Wilson, however, de-

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[3] Employee Johnnie Davis, Sr., testified that Wilson told him on three different occasions prior to the election that he would lose his job and that his new pickup truck would be destroyed if he did not join the Union (A. 21-22). Mrs. Evelyn McKim testified that Wilson advised her to "get on the ball because the Union was coming in, and [she] would be out" (A. 51). She testified further that Wilson warned her that "everybody else will sit down and make it so hard on you that [the Company] will have to fire you because nobody will work with you" (A. 51). Employee Jerry Thomas testified that Wilson warned him that Union members would "sit down" when he came to work and would "make it so hard on [him] that [he] would have to quit" (A. 60, 62).

nied ever having made the statements attributed to him or any other threats (A. 64-70). Based on his demeanor on the stand—which "impressed me not only as that of a truthful witness but as one whose character would be totally inconsisten with the accusations leveled against him"—the Trial Examiner credited Wilson's denials of impropriety in his solicitations for the Union (Pet. App. C10).

B. The Decisions Below

The Board adopted the Trial Examiner's finding that Wilson had not engaged in the improper conduct attributed to him by the Company's witnesses. Applying the principle of *National Labor Relations Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21,[4] it held, in agreement with the Examiner, that, by discharging Wilson for alleged improprieties in his organizational efforts which in fact had not occurred, the Company violated Section 8(a)(1) of the Act. (Pet. App. C2, C10.) The Board ordered the Company to cease and desist from the unlawful conduct found, to offer Wilson reinstatement with backpay, and to post appropriate notices (Pet. App. C2, C12, C13). The court of appeals, in a *per curiam* decision, enforced the Board's order (Pet. App. A).

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[4] In *Burnup & Sims*, the Court held that an employer violates Section 8(a)(1) of the Act by discharging an employee engaging in activity protected by Section 7 even if he is motivated by the good faith, but mistaken, belief that the employee has engaged in misconduct which justifies the discharge.

ARGUMENT

Petitioner acknowledges (Pet. 3) that, if Wilson had not made the threats attributed to him by the Company's witnesses, his discharge violated Section 8(a)(1) under the principle of *Burnup & Sims, Inc.*, *supra*. The petition, then, involves only the question whether the Trial Examiner erred in crediting Wilson's testimony over that of the Company's witnesses. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the Trial Examiner acted within his authority in crediting Wilson on the basis of his impressive demeanor, even though Wilson, as a potential backpay recipient, had an interest in the outcome of the proceedings. See *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408.[5]

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[5] Petitioner's claim (Pet. 8) that a conflict exists between the Fifth and Sixth Circuits in the application of the substantial evidence standard is without merit. In *National Labor Relations Board* v. *Elia Bros. Big Boy, Inc.*, 327 F. 2d 421, 426-427, and *National Labor Relations Board* v. *Mt. Vernon Tel. Co.*, 352 F. 2d 977, 979-980, relied on by petitioner, the Sixth Circuit overturned credibility findings of the Trial Examiner not only because the witnesses in question were potential backpay recipients, but also because their testimony was found to be vague and evasive and they were specifically discredited with respect to other matters. The Fifth Circuit has acknowledged that "in a proper case the Court may decline to follow the action of the examiner in crediting and discrediting testimony * * *" (*National Labor Relations Board* v. *American Art Industries, Inc.*, 415 F. 2d 1223, 1227), but correctly concluded that this was not such a case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
NORTON J. COME,
Assistant General Counsel,
ROBERT E. WILLIAMS,
Attorney,
National Labor Relations Board.

OCTOBER 1971.

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